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Equity--Restrictive Covenants--Specific Performance--Waiver--Estoppel--Injunction (Kew Garders Corp. v. Ciro's Plaza, 261 App. Div. 576 (2d Dep't 1941))

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expended an amount far in excess of the amount she could possibly have received under the most liberal interpretation of the agreement. The determining factor in arriving at the intent, in the case referred to, was the character of the deceased and that of the brother which showed an inclination toward unlimited study and education.

P. D. A.

EQUITY—RESTRICTIVE COVENANTS—SPECIFIC PERFORMANCE—WAIVER—ESTOPPEL—INJUNCTION.—Action for specific performance of a covenant contained in a deed which conveyed certain premises in Kew Gardens, upon which is now erected the Homestead Hotel. The covenant prohibited the public sale of liquor and other alcoholic beverages. The plaintiff reserved the right to cancel, modify or annul, in whole or in part, the restrictive covenant. Plaintiff, pursuant to its reservation, released restrictions on other parcels in the Kew Gardens Development so as to permit the sale of intoxicating liquors in stores and taverns. Plaintiff seeks to enjoin defendant from operating a cocktail lounge and bar. *Held,* judgment for plaintiff reversed. Where the grantor of the deed, allowing the construction of a hotel, which was restricted by the covenant, knew that wine and beer were sold at the hotel since 1933, but failed to take action for specific performance of the restrictive covenant until September, 1940, at a time when it knew that the defendants were in the process of constructing a new cocktail lounge and bar, and it appeared that grantor had released other properties in the same tract from similar restrictions, the grantor "waived" any right which it might have had to enforce the restriction as against the hotel premises, and was "estopped" from enforcing the restriction. *Kew Gardens Corp.* v. *Ciro's Plaza,* 261 App. Div. 576, 26 N. Y. S. (2d) 553 (2d Dep't 1941).

Restrictive covenants are not favored by the law [1] as they are repugnant to trade, commerce, and the free transfer of real property.[2] Because they are abhorred by the common law as a deterrant to the land for all the lawful purposes which go with title and possession,[3] it has been the policy of the courts to construe these covenants strictly

[1] Thompson v. Glenwood Community Club, 191 Ga. 196, 12 S. E. (2d) 623 (1940); Baltimore Butchers Abbatoir and Livestock Co. v. Union Rendering Co., 17 A. (2d) 130 (C. A. Md. 1940); Whitmarsh v. Richmond, 20 A. (2d) 161 (C. A. Md. 1941); State *ex rel.* Bollenbeck v. Village of Shorewood Hills, 237 Wis. 50, 297 N. W. 568 (1941).

[2] Hall v. Koehler, 148 S. W. (2d) 489 (Sup. Ct. Mo. 1941); Bass v. Hunter, 216 N. C. 505, 5 S. E. 558 (1939); Batchelor v. Hinkle, 132 App. Div. 62, 117 N. Y. Supp. 620 (1st Dep't 1909); Getchal v. Lawrence, *et al.,* 121 Misc. 359, 201 N. Y. Supp. 121 (1923).

[3] Sharp v. Quinn, 214 Cal. 194, 4 P. (2d) 942 (1931).

against parties seeking to enforce them,[4] when not to do so would cause an encumbrance upon the use of the land without at the same time achieving any substantial benefit to the covenantee.[5] Where the reason for the enforcement of a restrictive covenant has ceased, as where a neighborhood has completely changed from a residential section to a business district, equity will no longer enforce the covenant,[6] the restriction, in such a case, being an encumbrance upon the economic use of the land, and its enforcement would be unjust and inequitable.[7] Where a grantor gave to a grantee its consent in writing to the use of premises which was forbidden by a covenant in the deed, the grantor was equitably estopped from seeking to enforce restrictions as against the grantee.[8] A plaintiff, having conveyed to herself land, as executrix, by full covenant warranty deed, free from a restrictive covenant created in the deed by the original grantor, was held to have abandoned any right to enforce such covenant which she might have possessed as owner of adjoining property.[9] The defendant, in an action for specific performance of a restrictive covenant, conducted a private school upon premises restricted to dwelling purposes by a covenant in the deed of grant. It was held that where the plaintiff seeking to enjoin the use of the adjoining premises for school purposes, in violation of the restrictive covenants, sent his children to the school, and did not object for three years after its establishment or until defendant lessor purchased the building, he is estopped from enjoining such use.[10] When a plaintiff stands idly by and permits the erection of a structure in violation of a restrictive covenant in a deed, without objecting, the aid of a court of equity has been summoned too late and it will not interfere.[11]

If the reason for the enforcement of a restrictive covenant has ceased by virtue of changes in a neighborhood occurring through normal means,[12] or where the covenantee has been instrumental in de-

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[4] Moore v. Kimball, 291 Mich. 455, 289 N. W. 213 (1939); Van Deusen v. Ruth, 343 Mo. 1096, 125 S. W. (2d) 1 (1939); Ritzenthaler v. Stehler, 170 Misc. 618, 10 N. Y. S. (2d) 898 (1939); Todd v. Sablosky, 339 Pa. 504, 15 A. (2d) 677 (1940); Fischer v. Reissig, 143 S. W. (2d) 130 (Civ. App. Tex. 1940).

[5] American Weekly v. Patterson, — Md. —, 16 A. (2d) 912 (1940); Hall v. Koehler, 148 S. W. (2d) 489 (Sup. Ct. Mo. 1941).

[6] Bass v. Hunter, 216 N. C. 505, 5 S. E. (2d) 558 (1939); Heartt v. Kruger, 121 N. Y. 386, 24 N. E. 841 (1890); Snell v. Levitt, 110 N. Y. 595, 18 N. E. 370 (1888).

[7] Baltimore Butchers Abbatoir and Livestock Co. v. Union Rendering Co., 17 A. (2d) 130 (C. A. Md. 1941); Boyden v. Roberts, 131 Wis. 659, 111 N. W. 701 (1907).

[8] People on Complaint of Wolff v. Margolies, 166 Misc. 135, 1 N. Y. S. (2d) 969 (1937); Rose v. Jasima Realty Corp., 218 App. Div. 646, 219 N. Y. Supp. 222 (2d Dep't 1926).

[9] Goldman v. Lewis, 226 App. Div. 745, 233 N. Y. Supp. 596 (2d Dep't 1929).

[10] Hart v. Little, 103 Misc. 620, 171 N. Y. Supp. 6 (1918).

[11] *Ibid.*

[12] Ewertson v. Gerstenberg, 186 Ill. 344, 57 N. E. 105 (1900); Columbia

stroying the purpose for which the covenant was created,[13] courts of equity will not enforce such covenants.[14]

S. L.

HUSBAND AND WIFE—DECEDENT'S ESTATE LAW § 18—TOTTEN TRUSTS.—Gustav Krause and Mary Krause, plaintiff, were married in 1932. At that time the former had three children from an earlier marriage. In 1935 he opened in the Buffalo Savings Bank an account in his name "as trustee for Anna Severin", one of these three children. No withdrawal was ever made from this account, and on his death there was $3,552.77 therein. On July 19, 1938, he executed two warranty deeds to his two sons, which conveyed to each grantee a parcel of real property subject to a life tenancy in the grantor. There was no consideration paid for these deeds, and they were recorded on the same day. Gustav Krause having died on October 17, 1938, the wife brings this action under Section 18 of the Decedent's Estate Law for her share in his property. Plaintiff claims that these transactions are illusory and fraudulent and executed for the sole purpose of depriving her of her inheritance. Therefore, she asks the court to declare that this property was a part of the estate of Gustav Krause at the time of his death. The trial court has held for the plaintiff, that both transactions were illusory. The Appellate Division held the real property transfers were valid and reversed a finding of the trial court that the bank account transfer was illusory. On appeal, *held,* Appellate Division decision modified. The real property transfers were valid, but the transfer of the bank account illusory. The real property transfers were real in that the grantor divested himself of a major legal estate in real property evidenced by recorded warranty deeds which contained no power of revocation. The fact that no consideration was shown is immaterial. As to the savings bank account transfer, since the sole evidence of the intent of the testator was the form of the deposit, the inference must be drawn that he intended to reserve power during his lifetime to deal with the deposit in any way he should choose, and there is no foundation for a finding that testator had made a gift *inter vivos* to his daughter of the sums deposited in his name as trustee. *Krause* v. *Krause,* 285 N. Y. 27, 32 N. E. (2d) 779 (1941).

The instant case once again brings up the question concerning

College v. Thacher, 87 N. Y. 311 (1882); Amerman v. Deane, 132 N. Y. 355, 30 N. E. 741 (1892).

[13] Jackson v. Stevenson, 156 Mass. 496, 31 N. E. 691 (1892); Columbia College v. Thacher, 87 N. Y. 311 (1882); Roth v. Jung, 79 App. Div. 1, 79 N. Y. Supp. 822 (2d Dep't 1903).

[14] Knowlton Bros. v. N. Y. Air Brake Co., 169 App. Div. 324, 154 N. Y. Supp. 675 (4th Dep't 1915).